Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

MAURCIE RIEMER CALHOUN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether a district court, in light of this Court's opinion in *Blakely v. Washington*, __ U.S. __, 124 S. Ct. 2531 (2004), can enhance the sentence given a defendant pleading guilty by relying on facts not contained in the bill of information to which the defendant pled guilty and not otherwise admitted by the defendant.

2) Whether a district court can enhance the sentence of a defendant pleading guilty by relying on conduct not charged in the bill of information to which the defendant pled guilty, not contained in the Pre-Sentence Report and not disclosed to the defendant prior to the sentencing hearing.

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Petitioner, Maurice Riemer Calhoun, respectfully requests and prays that this Court issue a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, rendered on August 26, 2004.

OPINIONS BELOW

Mr. Calhoun's petition for a writ of certiorari seeks review of the August 26, 2004 decision of the United States Fifth Circuit Court of Appeals in *United States v. Calhoun*, 03-30916 (5th Cir. 2004) (App. A). That decision affirmed on direct appeal the conviction of Calhoun entered on September 25, 2003. (The relevant portions of the trial transcript from the district court are set forth in Appendix B).

STATEMENT OF JURISDICTION

The Petitioner filed a timely petition for rehearing *en banc* and the Fifth Circuit denied that request on October 6, 2004 (App. C). This Court now has jurisdiction to review this petition pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in relevant part that

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution states in relevant part that

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . .

STATEMENT OF THE CASE

On March 25, 2003, after a four-year long investigation, the United States commenced criminal proceedings against Maurice Riemer Calhoun, Jr. through the filing of a two-count bill of information. That bill of information charged Calhoun with wire fraud and equity skimming arising out of the rehabilitation and maintenance of affordable housing developments in Louisiana and Texas. Pursuant to a plea agreement entered into between Calhoun and the Government, Calhoun waived indictment and pled guilty to these two (2) counts on March 26, 2003.

The district court accepted Calhoun's plea and the Department of Probation filed its Pre-Sentence Report on September 2, 2003. Under the pre-amendment guidelines applicable to this case, Mr. Calhoun had a base level of six (6) points. Because the PSR calculated the total loss sustained by the alleged victims of Mr. Calhoun at over $2.5 million, the court added thirteen (13) points to that base level, pursuant to U.S.S.G. § 2F1.1(N). It then added two (2) points

to that sentence for alleged obstruction of justice[1], four (4) points for Mr. Calhoun's role in the offense, and two (2) points for more than minimal planning. Deducting three (3) points for acceptance of responsibility, the PSR reached a final level of twenty-four (24) points. Both the Government and Calhoun objected to the Pre-Sentence Report and the district court convened a sentencing hearing.

On September 11, 2003, the district court conducted a hearing to determine the appropriate sentence to be imposed on Mr. Calhoun. Calhoun re-urged through counsel the objections already made to the Pre-Sentence Report in pre-sentence submissions. The Government and Mr. Calhoun stipulated, and the PSR and the district court agreed, that the conduct alleged in the indictment occurred prior to the amendment of the Sentencing Guidelines effective on November 1, 2001. Therefore, the lower court sentenced Mr. Calhoun using pre-amendment guidelines.

At the conclusion of the hearing, the district court accepted the PSR recommendation as to the calculation of the sentence for Mr. Calhoun. Applying the Guidelines for a sentence within that range the court sentenced Mr. Calhoun to concurrent prison terms of sixty (60) months on each count. It further ordered Calhoun to pay restitution for his conduct under Count One in the amount of $1,577,000 to Boston Capital and $130,890 to certain partnerships subject to the equity skimming allegations of Count Two. At no time did the district court either convene a sentencing jury or limit its factual findings to those facts contained in the bill of

1. Although the district court accepted the PSR's recommendations as to the loss calculations to be made, it did not adopt the PSR's recommendations as to the reasons for which it would impose the obstruction of justice enhancement.

information to which Calhoun pled guilty. It instead relied on testimony and the findings of the PSR to determine the means and method by which it would sentence Calhoun. Calhoun timely filed a notice of appeal to the United States Fifth Circuit Court of Appeals.

On appeal, through a Rule 28(j) letter filed after this Court's rendition of *Blakely*, Calhoun asserted that the district court's use of facts not contained in the bill of information violated *Blakely*. In an opinion rendered on August 26, 2004, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the lower court in all respects. Calhoun timely filed a *Petition for Rehearing* which the Fifth Circuit denied on October 6, 2004. This request for certiorari followed.

REASONS FOR GRANTING THIS PETITION

This petition presents two interrelated constitutional queries concerning the notice and process afforded a criminal defendant who pleads guilty to a bill of information and is subsequently sentenced pursuant to the Federal Sentencing Guidelines. The first—whether a district court can rely on evidence outside the bill of information to which the defendant has pled guilty to enhance that defendant's sentence—will be ultimately resolved by this Court's decisions in *United States v. Booker*, No. 04-104 (U.S.) and the consolidated case of *United States v. FanFan*, No. 04-105 (U.S.), a resolution that should require remand of this petition to the Fifth Circuit for reconsideration in light of the expected decisions in those cases. The second—whether a district court can rely on conduct not disclosed to a criminal defendant prior to the sentencing hearing to enhance a defendant's sentence—presents a substantial issue of

constitutional criminal procedure on which a direct split currently exists amongst the circuits. These twin issues of constitutional law compel this Court's attention and disposition in light of the most recent Court precedent concerning the Federal Guidelines.

I. This Court Should Grant This Petition And Remand The Case For Reconsideration In Light Of The Court's Ultimate Decision In *Booker* And *Fan-Fan*.

The district court enhanced Calhoun's sentence thirteen (13) levels based on the loss he allegedly intended.[2] It further used three (3) categories of conduct to increase the guideline levels used to calculate Mr. Calhoun's sentence—obstruction of justice (two levels), more than minimal planning used to commit the crime (two levels) and the occupancy by Calhoun of a leadership role in the offense charged (four levels). None of the facts underlying these enhancements were contained in the bill of information to which Mr. Calhoun pled guilty. Post-*Blakely*, it is apodictic that findings on any aspect of sentencing that increase the punishment meted out to a criminal defendant *must* be either contained in the indictment or bill of information to which the defendant pleads guilty or found by a jury after trial. *See, e.g., United States v. Montgomery*, 2004 WL 2050164 at *12 (9th Cir.) ("Because the district court enhanced O'Connor's sentence seven levels on the basis on an amount of loss that was neither found by the jury nor alleged in the indictment, there is plain error"); *United States v. Schaefer*, 2004 WL 2029319 (7th Cir.) ("the Guidelines' contrary assertion that a district judge may

2. Calhoun's baseline offense level was six (6) points. The district court added thirteen (13) points to that baseline due to its finding that the intended loss for sentencing purposes exceeded the $2.5 million threshold for such an enhancement.

make such factual determinations based upon the preponderance of the evidence runs afoul of the Sixth Amendment.") The type of judicial fact finding engaged in by the district court is absolutely prohibited by *Blakely*.[3]

This Court's decision in *Blakely*, *supra*, clearly held that use of facts extrinsic to a bill of information for enhancement purposes is prohibited by the Sixth Amendment. In *Blakely*, the defendant pled guilty to kidnapping. *Blakely*, 124 S. Ct. at 2535. Under Washington's sentencing guidelines the charge to which the defendant pled carried a sentence within the 49-53 month range. *Id.* Solely relying on testimony presented at the sentencing hearing, the district court found the crime

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3. Although the Government may protest that the judicial determination of these facts was made pursuant to the plea agreement, any such protest should fall on deaf ears. Pre-*Blakely*, the law in the Fifth Circuit was that judicial fact finding in the context of a plea agreement was a normal and accepted practice and it would have been ludicrous for Calhoun to have risked the loss of his plea agreement by insisting on anything else. Under similar circumstances, the Seventh Circuit has recognized that

> in light of the sea change in federal sentencing law wrought by *Blakely* and *Booker*, we think it appropriate to take note of the possibility of an unconstitutional sentencing enhancement. *See United States v. Seacott*, 15 F.3d 1380, 1383 (7th Cir. 1994). Given the precedent in this circuit prior to *Blakely*, we think it would be unfair to characterize Ms. Pree as having waived a challenge to the validity of her sentencing enhancement.

United States v. Pree, 2004 WL 2039724 (7th Cir.). It would be unfair and unrealistic to fault Calhoun for not objecting to what, prior to *Blakely*, was a non-issue. The Court should therefore find the absence of any waiver of Calhoun's Sixth Amendment rights as interpreted by *Blakely*.

to have been enacted with "deliberate cruelty," permitting a statutory enhancement of the sentence to ninety months. *Id.* at 2536. Reversing Blakely's sentence as violative of the Sixth Amendment, this Court held:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.
>
> * * *
>
> In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury.
>
> * * *
>
> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* See *Ring*, *supra*, at 602, 122 S.Ct. 2428 (" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone' " (quoting *Apprendi*, *supra*, at 483, 120 S.Ct. 2348)); *Harris v. United States*, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. *Apprendi*, *supra*, at 488, 120 S.Ct. 2348 (facts

> admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.

Id. at 2536-37 (italics in original). Although the Court deferred the issue of whether this rule invalidated sentences reached under the Federal Sentencing Guidelines, *id.* at 2536 n.9, the dissenters clearly foreshadowed the application of this constitutional principle to invalidate the enhancement aspects of the sentencing scheme erected by the Federal Guidelines. *Id.* at 2543-44 (O'Connor, Breyer, Rehnquist and Kennedy JJ., dissenting) ("This suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate.") The constitutional underpinnings of this Sixth Amendment right to jury trial mandate the application of the *Blakely* rule to the instant matter.

This Court has now accepted emergency petitions for certiorari in *Booker* and *Fan-Fan* to consider whether the rule of *Blakely* applies to the Federal Sentencing Guidelines. Briefing in those cases has closed and this Court heard argument on the consolidated cases on October 4, 2004. The ultimate rule decided on by the Court concerning *Blakely*'s application to the Federal Sentencing Guidelines will apply to the matter *sub judice* and will determine whether

or not the lower courts erred in using extrinsic evidence to enhance Calhoun's sentence. *See generally*, *Wright v. West*, 505 U.S. 277, 292-293 (1992) ("We have said, for example, that new rules always have retroactive application to criminal cases pending on direct review"); *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987) ("failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.") Because this matter is now pending on direct appeal from Calhoun's sentence, the Constitution requires application of the rule ultimately articulated by *Booker* and *Fan-Fan* to the instant conviction. The Court should therefore accept this petition and remand the matter, once the Court decides *Booker* and *Fan-Fan*, for reconsideration in light of those decisions.

II. If The Court Does Not Remand This Case In Light Of *Booker* And *Fan-Fan*, The Court Should Accept Certiorari To Consider Whether The Government Is Required To Give A Defendant Notice Of Specific Conduct That Will Be Used To Seek Sentence Enhancement.

The Fifth Circuit affirmed the district court's decision to enhance Mr. Calhoun's sentence based, in the main, on the allegation that Calhoun asked an associate to retrieve gold coins kept in a safe deposit box shortly before federal agents searched the box containing the coins and seized them pursuant to a warrant.[4] Allegations concerning this activity were not part of any submission made by any party to the district court, the conduct was never mentioned in the Pre-Sentence Report submitted to the district court, and the sole factual basis for this enhancement arose during the

4. The record was devoid of any suggestion that Calhoun had advanced notice of the search.

testimony of the associate on the second day of the sentencing hearing. The Fifth Circuit's decision to countenance the use of such ill-noticed conduct as a basis for enhancement creates a circuit split between the instant decision and those in *United States v. Walker*, 234 F.3d 780 (1st Cir. 2000) and *United States v. Jackson*, 32 F.3d 1101 (7th Cir. 1994). Resolution of this circuit split mandates this Court's attention.

Although the Fifth Circuit opined that Calhoun had adequate notice of the possible use of this conduct for enhancement purposes, *see* Opinion at p. 7 n.1, the lower court's reliance on *United States v. Marmolejo*, 89 F.3d 1185 (5th Cir. 1996), is misplaced. *Marmolejo* involved enhancement of a defendant's sentence based on alleged obstruction occurring through the commission of perjury by the defendant in his underlying trial. *Id.* at 1201. *Marmolejo* expressly followed *United States v. Knight*, 76 F.3d 86 (5th Cir. 1996), to hold that "if the defendant has actual knowledge of the facts on which the district court bases an enhancement or a denial of a reduction, the Sentencing Guidelines themselves provide notice of the grounds relevant to the proceeding sufficient to satisfy the requirements of Rule 32 and U.S.S.G. § 6A1.3." *Marmolejo*, 89 F.3d at 1201. Yet both *Marmolejo* and *Knight*—the latter of which involved enhancement for obstruction based on the falsity of representations made by the defendant in a letter sent to the district court just prior to his sentencing, *Knight*, 76 F.3d at 88—involved conduct that occurred within the context of the sentencing process itself. Neither the Fifth Circuit nor any other court has ever applied the rule of *Knight* to hold, as the Fifth Circuit did in this case, that no advance notice of facts supporting obstruction is necessary even when the facts giving rise to the enhancement occurred well in advance of the sentencing process and wholly outside of the context of any court proceedings.

The Fifth Circuit's extension of the *Knight* rule to conduct occurring outside the sentencing process creates a direct split between the Fifth Circuit and the First and Seventh Circuits. In *United States v. Walker*, 234 F.3d 780 (1st Cir. 2000), where the Government sought to use a witness to testify to grounds for an obstruction enhancement not previously outlined in the PSR, the court expressly refused to extend that rule to pre-hearing conduct, holding that "in this case the government rather than the court raised the possible sentencing enhancement, and here the court declined to consider the requested enhancement because it felt the government had not played fair under the rules. That is a very different issue." To the same effect is the Seventh Circuit's holding in *United States v. Jackson*, 32 F.3d 1101 (7th Cir. 1994), where the court held under similar circumstances that "the district court must provide sufficient notice to the parties *of the specific facts which the court intends to rely on* so that the parties may contest the issue at sentencing." *Id.* at 1105 (emphasis added). Adherence to the constitutional requirements of notice and an opportunity to be heard compel adoption of a rule requiring the Government to give notice in advance of a sentencing hearing of the facts on which it will rely to seek an enhancement of the defendants sentence.

This is a significant issue deserving of this Court's attention. By using *Knight* and *Marmelejo* to uphold the district court's failure to advise Calhoun *in limine* of the conduct to which Frye ultimately testified, the Fifth Circuit has extended the *Knight* rule to the point that a criminal defendant must prepare himself to respond to a virtual day-by-day narrative of his life and activities prior to trial. Use of such a rule undermines the notice requirements of the Fifth Amendment. It further eviscerates the efficacy of a

pre-sentencing process that purports to rely for sentencing on submissions made by the parties and a Pre-Sentence Report filed between the time of a guilty plea and the sentencing of the Defendant. Determination of whether to extend the *Knight* rule to these extremes is a question warranting consideration by this Court.

CONCLUSION

For the foregoing reasons, Maurice Riemer Calhoun, Jr. moves this Court to grant this petition for writ of certiorari and, if the Court deems it appropriate, to remand this matter for reconsideration once this Court renders an opinion in *United States v. Booker* and *United States v. FanFan*.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 26, 2004

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 03-30916

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAURICE RIEMER CALHOUN, JR.,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Louisiana

Before DAVIS, EMILIO M. GARZA and PRADO, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Maurice Riemer Calhoun Jr. ("Calhoun") pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343 and one count of conspiracy to commit equity skimming in violation of 18 U.S.C. § 371, arising out of his rehabilitation and maintenance of affordable housing developments in Louisiana and Texas. The district court determined that Calhoun's total offense level was 24 and sentenced him to

60 months of imprisonment on each count, to be served concurrently. On appeal, Calhoun challenges the district court's application of the Sentencing Guidelines. He contends that the district court erred in (1) its loss calculation under U.S.S.G. § 2F1.1; and (2) in assigning two points for obstruction of justice under U.S.S.G. § 3C1.1. We find that the district court applied the Sentencing Guidelines correctly and accordingly we affirm Calhoun's sentence.

I

Calhoun was charged with wire fraud based on his development of thirty-five distressed properties in Louisiana under the Low-Income Housing Tax Credit Program run by the Louisiana Housing Finance Agency ("LHFA"). The LHFA provides tax credits for investors in low-income apartment complexes to finance the development and rehabilitation of the complexes. The LHFA approves projects based on LHFA guidelines and monitors construction and related costs to insure that the projects comply with the program guidelines as established in the Qualified Application Plan ("QAP").

The QAP limits the developer's fee to a maximum of 15% of the costs of development *plus* 8% of the costs of acquisition of distressed properties. In addition, the builder is entitled to a profit of 8% of the costs of construction. If, however, there is an identity of interest between the developer and the builder, the developer is not entitled to both the 15% developer's and the 8% contractor's profit. The developer is limited to a developer's fee consisting of the 15% developer's profit plus the costs of acquisition. However, in order to gain bonus points for the competitive

application selection process, a developer may agree to limit their developer's fee to 10% of the costs of development only.

As developer of the thirty-five distressed properties, Calhoun hired Ham Contracting Inc. ("HCI") as general contractor. Calhoun and HCI agreed that HCI would perform the construction on these properties and that the profits from the construction work would be diverted to Calhoun. Calhoun did not, however, reveal this identity of interest to the LHFA, which enabled Calhoun to collect a larger overall fee. Calhoun also increased his overall fee by submitting fraudulent cost certificates which overstated costs and understated profits.

HCI diverted the contractor's profits and the overages from the inflated costs to Calhoun by purchasing gold coins, which were listed as assets of HCI. These coins were kept in safe deposit boxes under Calhoun's control at the Louisiana Coin Exchange. The district court found that the total excess profit gained by Calhoun as a result of the wire fraud was $2,463,995.

Calhoun also plead guilty to conspiracy to commit equity skimming based on loans he received from Rural Development for the acquisition and rehabilitation of forty-seven multi-family affordable housing units in Louisiana and Texas. Rural Development is an agency of the United States Department of Agriculture that lends money for the construction of rural low-income and elderly multi-family housing projects. The Rural Development loans are collateralized by reserve accounts maintained by the borrower

that can only be used to meet necessary expenses of the property. In order to use the reserve accounts the borrower must submit reserve requests to Rural Development for approval.

Calhoun owned Calhoun Property Management, L.L.C., which acted as a manager for the partnerships that owned the housing complexes financed by the Rural Development loans. Calhoun decided to request reserve funds to make capital improvements on the various housing complexes. He directed an employee to submit reserve requests that exceeded the amount estimated to complete the repairs on the properties by approximately 130%. These reserve requests required the solicitation of at least three competitive bids prior to the release of funds. Calhoun, however, rigged the bidding process so that a construction company he controlled would always do the work. Calhoun then diverted the undisclosed profits for his own use.

Calhoun submitted these fraudulent requests for at least 47 properties. Although Rural Development in Louisiana denied many of the requests as excessive, Rural Development in Texas approved eleven out of twenty-four reserve requests. The district court determined that the correct measure of the loss caused by Calhoun's fraud was the intended loss and not the actual loss. Accordingly, the district court considered all of Calhoun's fraudulent reserve requests, including those not approved, to determine that the intended loss from the equity skimming scheme was $1,106,303.62. When the loss from the wire fraud charge was added to the loss from the conspiracy to commit equity skimming count, it totaled $3,570,298.62. Under U.S.S.G. § 2F1.1, because the loss total

was greater than $2.5 million, but less than 5 million, the district court enhanced Calhoun's sentence by thirteen points.

The district court also enhanced Calhoun's sentence by two points for obstruction of justice based on the following facts: Calhoun became aware of the government's investigation of him between mid-1999 and early 2000. During the course of his schemes, Calhoun had gold coins placed in three boxes at the Louisiana Coin Exchange. In May 2002, Calhoun asked his employee, Thomas Frye, to retrieve the gold coins from one of these boxes, numbered box 122. Before Frye arrived at the Louisiana Coin Exchange, however, Calhoun called to tell him that the government was already there drilling the boxes. The government found that boxes 120 and 121 were empty. Box 122, however, contained gold coins, which the government confiscated.

The following month, Calhoun visited his safe deposit box at Hibernia Bank in Mansfield, Louisiana. Shortly thereafter, he brought gold coins to his son's house in Louisiana and left them in a trash can outside the residence. His daughter-in-law subsequently moved the coins to her brother's home.

II

Calhoun asserts that the district court erred in calculating his sentencing guideline loss under U.S.S.G. § 2F1.1. The calculation of the amount of loss is a factual finding, reviewed for clear error. *United States v. Sanders,* 343 F.3d 511, 521 (5th Cir.2003). This means that the finding must be plausible in light of the record as a whole. *Id.*

Appendix A

Calhoun first contends that the district court's loss calculation was incorrect because it failed to take into account an 8% cost of acquisition fee to which he was legally entitled. During the competitive application process, however, in exchange for bonus points Calhoun agreed to limit his developer's fees to 10% of the Developer Fee Base. Calhoun thus relinquished any claim to the extra 5% of the Developer Fee Base and 8 % of the Acquisition Cost Base to which he normally would be entitled. Calhoun was not entitled to a fee consisting of 8% of the cost of acquisition of the distressed properties.

Calhoun also contends that the wire fraud guideline loss calculation should have taken into account the $355,653 in losses he sustained on certain of the rehabilitation projects. We need not address this argument, because even assuming that Calhoun is correct, reducing his loss by $355,653 would not effect his sentence range under § 2F1.1.

Calhoun also objects to the district court's calculation of the loss stemming from the conspiracy to commit equity skimming charge. He asserts that it was incorrect to use the gross amount of reserve funds that he requested from Rural Development instead of the amount actually approved by Rural Development to calculate the loss. The Sentencing Guidelines state that "[c]onsistent with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." U.S.S.G. § 2F1.1 cmt. n. 8. Intended loss is the appropriate measure of loss when the loss is "1) resulting from convictions for an 'Attempt, Conspiracy or Solicitation'

to commit some other substantive offense which the Defendant was attempting to commit; 2) which is capable of being determined; and 3) is greater than the 'actual loss.'" *See Sanders,* 343 F.3d at 522.

Here, the intended loss should be used to determine Calhoun's sentence. First, the loss is a result of Calhoun's conviction for *conspiracy* to commit equity skimming. Second, the intended loss can be calculated based upon the amount of reserve that Calhoun initially requested. The reserves requested by Calhoun were not disbursed because of actions taken by Rural Development, not as a result of any action taken by Calhoun. The refusal to grant certain of Calhoun's requests did not impact Calhoun's intent to cause loss. *Cf. Sanders,* 343 F.3d at 514-15 (Actual loss was the appropriate measure of loss where a smaller loan was disbursed than initially requested when the defendant reduced the loan amount requested of his own accord). The intended loss in this case is commensurate with the amount of reserve funds Calhoun requested. Finally, the intended loss is greater than the actual loss as Rural Development did not approve all of Calhoun's reserve requests. The *Sanders* factors that determine when to use intended loss as the measure of loss have been satisfied. The district court thus correctly used the requested reserve requests to calculate the loss stemming from the equity skimming charge.

Calhoun also contends that the district court erred by enhancing his sentence for obstruction of justice under U.S.S.G. § 3C1.1. The district court gave three reasons for applying the obstruction of justice enhancement: (1) Calhoun requested that Frye remove the gold from safe deposit box

122; (2) Calhoun transported gold to New Orleans; and (3) Calhoun altered an employment agreement and destroyed the computer on which it was made.

Section 3C1.1 provides for a two-point enhancement

> [i]f (A) the defendant willfully obstructed or impeded, or attempted to obstruct of impede, the administration of justice during the course of the investigation ... and (B) the obstructive conduct related to (i) the defendant's offense of the conviction, and any relevant conduct; or (ii) a closely related offense.

U.S.S.G. § 3C1.1 (2000). Calhoun contends that he did not request that Frye remove the gold from safe deposit box 122 with the intent to obstruct justice.

We review the question of whether Calhoun acted with the intent to obstruct justice for clear error. *See United States v. Chavarria,* __ F.3d __, 2004 WL 1551371 (5th Cir. July 12, 2004). The Government must show that Calhoun had the specific intent to obstruct justice by a preponderance of the evidence. *United States v. Greer,* 158 F.3d 228, 239 (5th Cir.1998). The district court is permitted to use circumstantial evidence to find that Calhoun engaged in a conscious and deliberate attempt to obstruct or impede the administration of justice. *Id.* The district court may draw all reasonable inferences from the evidence. *See United States v. Khedr,* 343 F.3d 96, 102 (2nd Cir.2003). Here, it was reasonable to infer that a request to remove gold coins that

were purchased with the proceeds of a fraud during a pending investigation was done with the intent to obstruct justice. The obstruction of justice enhancement based on Calhoun's request that Frye retrieve the gold coins from safe deposit box 122 is supported by the evidence.[1]

The record also supports an obstruction of justice enhancement based upon Calhoun's transportation of gold from Mansfield to New Orleans. Although Calhoun claims that the transported gold was unrelated to the charged conduct because it legitimately belonged to his wife, Marcia, the evidence shows that: 1) Calhoun transported gold from Mansfield to his son's residence in New Orleans; 2) Calhoun placed the gold in a trash can at the back of his son's house; 3) Calhoun's daughter-in-law then retrieved the gold from the trash and brought it to her brother's house; and 4) the gold was placed in a vacant room. The evidence also shows that the reason Calhoun placed the gold in a trash can outside his son's home was that his son did not want the gold in the house. This is strong circumstantial evidence that the transported gold was not legitimately owned. The Government met its burden to establish by a preponderance of the evidence that in transporting the gold to New Orleans Calhoun tried to obstruct justice by hiding his illegitimate

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1. The Sentencing Guidelines provided Calhoun with sufficient notice that the district court might enhance his sentence for obstruction of justice on the basis that he requested Frye retrieve the gold coins because Calhoun had actual knowledge of his request. *See United States v. Marmolejo*, 89 F.3d 1185, 1201 (5th Cir.1996).

gold. The two-point enhancement for obstruction of justice is supported by the evidence.[2]

AFFIRMED.[3]

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2. We need not address the district court's other basis for finding obstruction of justice, the creation of a false employment agreement and destruction of a computer, because the other two bases are sufficient to support the obstruction of justice enhancement.

3. The appellee's motion to file a letter supplementing the argument made at oral argument is denied.

APPENDIX B — EXCERPTED TRANSCRIPT

DISTRICT COURT REASONS FOR SENTENCING

[commencing at page 390]

this Court proud.

I will just finish by saying that -- I quote from Romans: All good things work together for good for those who serve the Lord. I'm-doing my best.

THE COURT: Mr. Van Hook, the sentencing in T.F. Management is scheduled at this same time. Does the Government have an argument to make on any of the objections? You had no objections to the report, so I guess I'll have to ask Mr. -- how many of the arguments in the T.F. Management presentence report are already addressed in the Riemer Calhoun.

MR. FAWER: We will rely on our submission, Your Honor; there is no need to argue any further. I think the Court has before it everything you need to have both the individual as well as the corporate.

THE COURT: All right. I'm responsible for both of these sentencings and I didn't want to leave anything that I'm required to do, undone.

MR. FAWER: As long as Your Honor has read our submission and presentence report and our submissions ins response, I'm satisfied.

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THE COURT: All right, sir. I'm supposed to do a guilty plea at 2:30, but I've just been handed a note that says that the judge down the hall offered to do the guilty plea. So that gives me a minute that I didn't have -- gives me 30 minutes I didn't have. And I'll be back.

[391] THE COURT: Please be seated. Two minor matters first. Do you have this book?

MR. FAWER: I bought the cheaper value.

THE COURT: Oh. Well, the red one on, page 497 will tell you that in the Fifth Circuit that the guidelines themselves put defense counsel on notice that all possible grounds for enhancement or reduction are: on the table at a sentencing hearing. That notice satisfies Rule 34 A and guideline Section 6(A)1.3. And you can write down *U.S. versus Knight* in 76 F.3d, 86 just in case you want to make that same speech again next time. Then I want you to read *Lister* and write me when you get back to New Orleans. We, too, believe, Fifth Circuit says, that the obstruction of justice enhancement should apply only to those cases where misconduct occurs with the defendant's knowledge of an investigation or at least with the defendant's correct belief that an investigation is probably underway.

MR. FAWER: I don't have any quarrel with that.

THE COURT: Just -- That's what we did. There was a particular thing that nobody argued about, but again I told you I'm not a potted plant. I read all this stuff you filed. And if I am any correct at all, Mr. -- Tommy, your partner was

coming to Shreveport in his car to pick up the gold coins. And he got a telephone call or you did, Mr. Calhoun did, saying [392] that Paul Pons said the Government is here drilling the boxes. And then he testified today that he got a call on the cell phone: Don't go get those coins; the Government got there ahead of you. That's an obstruction of justice, to send him to that box, knowing the investigation is underway to get the coins and just by they luck of the draw the Government got there first. That's under anybody's jurisprudence. That together with the computer destruction, even though not used, even the transport of the old gold to New Orleans because of a feeling that that's going to get caught, too, and he had a thing about gold coins, all of those things add up in my mind to obstruction of justice. And for that reason, your objection to obstruction of justice two points is overruled. The evidence is abundant.

I'm going to follow the rules. To follow the rules in sentencing says that I have to sentence within the guideline components and we are at level 24.

I want to say ahead of time to Mr. Calhoun that I don't recall any sentencing event since the advent of the guidelines that has required as much study and reading and contemplation as this one has. These enormous books, three of them filed by the lawyers, are only a part of the files. But the reading has been done and the time has arrived.

You made a handsome set of remarks, but I charge you to understand that from this side of the business that piety and . . .

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* * *

[394] Count 2 to run concurrently. Within 72 hours of release, you will report to the probation office here in Shreveport. And know that while on supervised releases you can't own any weapon; you cannot violate the special conditions of supervised release, which will be made known to you; and as a special condition of supervised release, you are excluded from participating in any Department of Agriculture program at their express request.

Restitution will be in the sum of $1,577,521 to Boston Capital. Page 42 of the pre-sentence report says that you owe $209,754 to the partnership representing the eleven property partnerships. The Government, in its closing argument, stated that $131,000 was their considered judgment as to restitution, and I shall order that restitution at the level at which the Government suggested, all of that is within the pre-sentence report.

I am informed by the First Assistant U.S. Attorney that the restitution to the Federal Land Bank -- Federal Home Loan Bank in Dallas has been satisfied by the one and a half million dollars plus other valuable considerations.

MR. VAN HOOK: Your Honor, the one and a half million dollars needs to be ordered at this sentencing hearing. The other valuable --

THE COURT: The million and a half has to be paid immediately; the other is to be done by copy of promissory note [395] which was furnished to the Court during the lunch hour.

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There is $100 owed to Count 1 and 2, to the crime victim fund. Did that get paid yet?

MR. FAWER: (Shakes head from side to side).

THE COURT: The defendant is ordered to pay a fine as to each of the two counts, $250,000 each. And this is based on the language in Paragraph 4 of the plea agreement. It is so ordered.

You are notified of your right to appeal. If a right to appeal is to be done, an appeal is to be filed, this presentence report will go to the Court of Appeals under seal. And I will order that any appeal filed on your behalf shall be prosecuted by Mr. Fawer. He knows more about this case than any other human being and nobody else ought to have to come up to learning speed in order to do it.

One question. Today is the 12th day of September. You have two ways to go to jail from this room. One is the marshal comes through that door and takes you down and puts you on the bus to some unknown destination by the Bureau of Prisons, or you can wait for the Bureau of Prisons to make that destination and take yourself there. Choose. Not you, him.

MR. FAWER: I want to get Your Honor's -- Mr. Van Hook discussed that --

THE COURT: What number of days, Mr. Calhoun? Fawer, I'm with Mr. Calhoun at the moment.

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[396] What reasonable number of days do you require to pack, your toothbrush and your stuff?

THE DEFENDANT: Forty-five days.

THE COURT: Thirty would be more like it.

THE DEFENDANT: Sir?

THE COURT: Thirty would be better. I will give you until October 13th at 2:00 in the afternoon to report to the designated institution.

Mr. Fawer, you wish a chance to talk to Mr. Van Hook before I go to the next subject?

MR. FAWER: If I might, the only thing I was going to ask was dealing with the item you just dealt with. We would ask the Court, and we know it's up to the Bureau of Prisons, to recommend incarceration that designation be Saufley Field, Pensacola.

THE COURT: I will be glad to make a recommendation. That's another branch of the Government. They don't have --

MR. FAWER: Quite independent, but they sometimes defer to gentlemen like yourself.

THE COURT: They sometimes have been known to do that. And I will make that recommendation.

MR. FAWER: Thank you, sir.

THE COURT: Yes, sir. Mr. Novak?

MR. VAN HOOK: Your Honor?

THE COURT: Yes, sir.

[397] MR. VAN HOOK: Before you move on to the sentencing of T.F. Management; the Government would request, based on the sentence imposed, the Court adopt --

THE COURT: I have one more question.

MR. VAN HOOK: Okay. Sorry, Your Honor.

THE COURT: We have one more --- we had one more question. Like I said, I'm not a potted plant. I've got to know what's going on up here.

In each of the rulings that the Court made on the subject matter of the various charges, one about obstruction and one about equity skimming and the other about Count 1, the Court adopts the factual findings in the presentence report, in the addendum to the presentence report.

In addition, there is a special finding that the testimony of the witnesses at the sentencing hearing found credible by the Court, were fully sufficient basis for the rulings made on the contested sentencing matters.

In T.F. Management case, sentencing in docket

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No. 3-03-50021-02, pursuant to the Sentencing Reform Act, the T.F. Management Company is on supervised probation for a period of five years. The defendant shall pay a $500,000 fine, which I believe has already been accomplished. This is a departure from the fine range stipulated in the guidelines because of paragraph 6 of the plea agreement where the Government and the defendant appear to agree that the maximum statutory fine was [398] $500,000.

As conditions of the five years of probation, T.F. Management shall not commit any other violations of any federal, state, or local law. They will be excluded from participating in any Department of Agriculture program during the period of probation. And in accordance with Title 18, Section 3013, the fine amount, the additional fine, special assessment amount on T.F. Management is $400.

The management company is notified of its right to appeal under the same circumstances as announced in the case of Mr. Calhoun. And again, Mr. Fawer will be, by the Court, appointed to prosecute any such appeal, should it occur.

MR. FAWER: Could I ask for one clarification that I forgot to ask about before?

THE COURT: Yes, sir.

MR. FAWER: You mentioned --

THE COURT: I was about to thank you for your thoughtful presentation, but I might want to hold that back.

MR. FAWER: I just want to get this on the record, but I do want you not to forget what you were going to say.

When you indicated the restitution of 1,577,521 to Boston Capital --

THE COURT: That's in addition; that's an add-on of the one million three that's already there.

MR. FAWER: An add-on? That's not that what the [399] presentence --

THE COURT: Just stay with the program. That's what the restitution to Boston Capital will be. It's in ink now.

MR. FAWER: Judge, I think the presentence report includes in that the million three. What the Government was asking was a million three plus the 277 to make up the 1,577,000. There's no basis for anything other than that.

MR. NOVAK: For the Court's information, there is $1.3 million in escrow.

THE COURT: Right.

MR. FAWER: And another 277 makes up the --

THE COURT: Another 277 is required.

MR. FAWER: Right. So that all I was saying --

THE COURT: Oh. I'm not double-dipping on you.

MR. FAWER: I thought, just want to make clear that the one point -- we get credit for the 1.3.

THE COURT: Absolutely. Absolutely. In capital letters.

MR. FAWER: Now, Your Honor, I have nothing else. You are free to --

THE COURT: Am I now free to say how nice you did? Oh. I have to say it. On occasion, I'm not -- I don't want to say it. I've been sitting here for, shortly it will be 30 years, and there have been good lawyers and sorry lawyers and lawyers that couldn't talk to one another in a civil tone. The [400] lawyers who have been presenting this case all along get gold stars for the civil manner in which they have dealt with each other and with the court. It's a pleasure. And I don't want to see any of you again anytime soon. Court is adjourned.

(End of proceedings)

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 6, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-30916

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MAURICE RIEMER CALHOUN, JR

Defendant - Appellant

Appeal from the United States District Court for the Western District of Louisiana, Shreveport

ON PETITION FOR REHEARING EN BANC

(Opinion 08/26/04, 5 Cir., ____, ____ F.3d ____)

Before DAVIS, EMILIO M. GARZA, and PRADO, Circuit Judges.

Appendix C

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Emilio M. Garza
United States Circuit Judge